I think a good indictment

Strong

Strong

3

Miller

# SUPREME COURT OF THE UNITED STATES.

No. ~~451.~~ 219

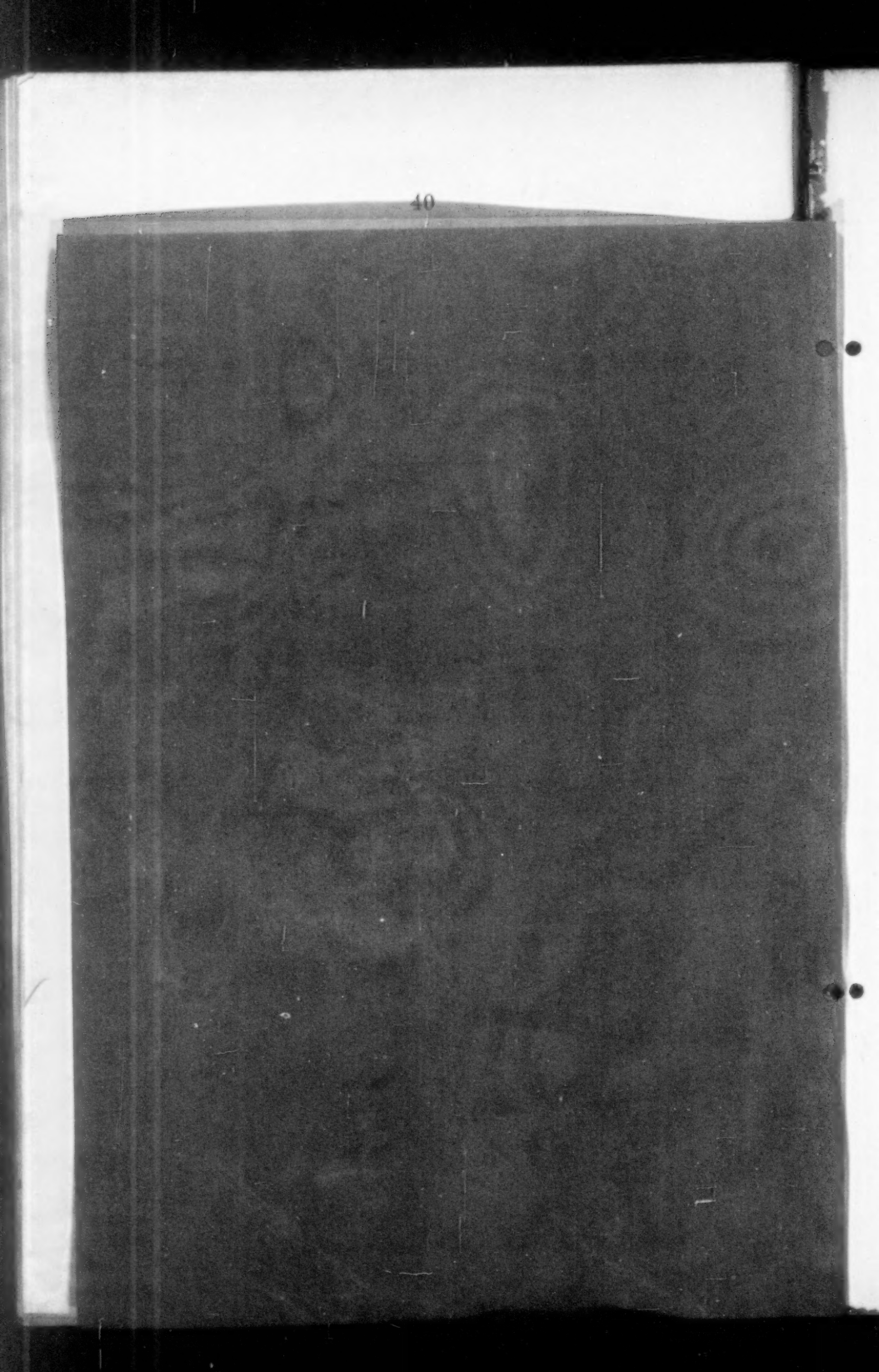
THE UNITED STATES, PLAINTIFF,

vs.

SETH HOWELL.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

FILED MAY 3, 1870.



# SUPREME COURT OF THE UNITED STATES.

## No. 451.

THE UNITED STATES, PLAINTIFF,

vs.

SETH HOWELL.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

INDEX.


| | Original. | Print. |
|---|---|---|
| Certificate of clerk | 18 | 7 |
| opposition of opinion | 13 | 5 |
| Demurrer | 7 | 3 |
| Indictment | 1 | 1 |
| Joinder in demurrer | 9 | 4 |
| Stipulation | 11 | 4 |

1 *Indictment.*

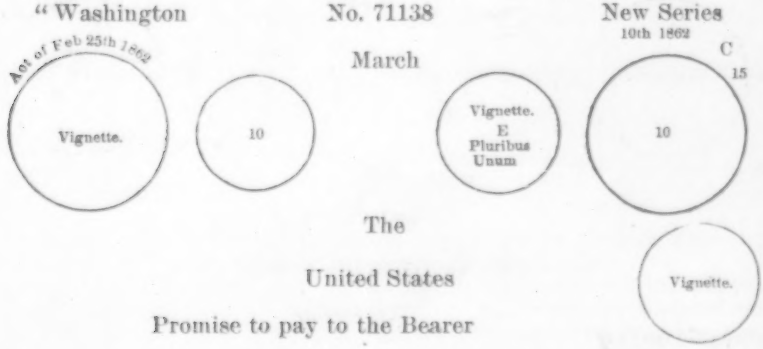
UNITED STATES OF AMERICA:

Circuit court of the United States, ninth circuit, for the district of California.

At a stated term of the said court, begun and holden at the city and county of San Francisco, within and for the district of California, on the first Monday of February, in the year of our Lord one thousand eight hundred and seventy.

The grand jurors of the United States of America, within and for the district aforesaid, on their oath present: That Seth Howell heretofore, to wit, on the twenty-fifth day of October, in the year of our Lord one thousand eight hundred and sixty-nine, with force and arms, in the city and county of San Francisco, and the State and district of California aforesaid, and within the jurisdiction of this court, feloniously did pass, utter, publish, and sell a certain false, forged, and counterfeited United States note, purporting to be a United States note issued under the authority of an act of Congress of the United States of America, entitled "An act to authorize the issue of United States notes, and for the redemption or funding thereof, and for funding the floating debt of the United States," approved February twenty-fifth, one thousand eight hun-

2 dred and sixty-two, and *and* which said false, forged, and counterfeited United States note then and there was and now is as follows, that is to say:




And on which said note was then and there indorsed:

UNITED STATES

This note is a legal tender for all debts,

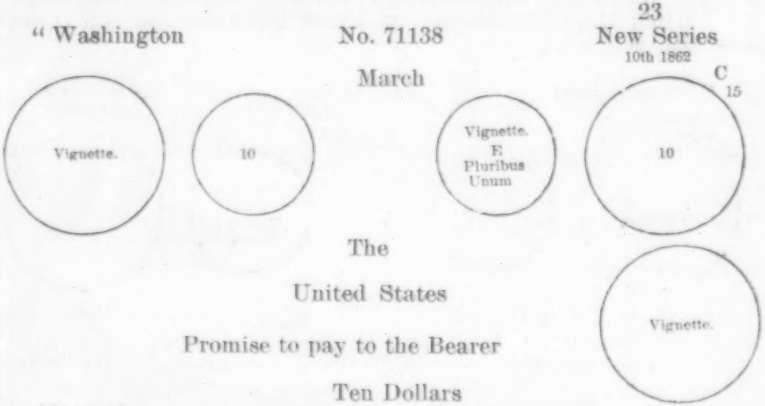
X public and private, except duties on imports and interest on the public debt and is receivable in payment of all loans made to the United States X

OF AMERICA"

—with intent then and there to defraud one Mary Lang, he, the said Seth Howell, at the time he so passed, uttered, published, and sold the said last-mentioned false, forged, and counterfeited United States note as aforesaid, then and there well knowing the same to be false,
3 forged, and counterfeited.

Against the peace and dignity of the United States of America, and against the form of the statute of the United States of America in such case made and provided.

And the grand jurors of the United States of America, within and for the district aforesaid, on their oath do further present: That Seth Howell heretofore, to wit, on the twenty-fifth day of October, in the year of our Lord one thousand eight hundred and sixty-nine, with force and arms, in the city and countyof San Francisco, and the State and district of California aforesaid, and within the jurisdiction of this court, feloniously did pass, utter, publish, and sell a certain false, forged, and counterfeited treasury note, issued under the authority of an act of Congress of the United States of America, entitled "An act to authorize the issue of United States notes, and for the redemption or funding thereof, and for funding the floating debt of the United States," approved February twenty-fifth, one thousand eight hundred and sixty-two, and which said false, forged, and counterfeited treasury note then and there was and now is as follows, that is to say:




And on which said note was then and there endorsed:

UNITED STATES

This note is a legal tender for all debts,
X public and private, except duties on imports and interest on the public debt, and is receivable in payment of all loans made to X
the United States

OF AMERICA."

—with intent to defraud one Mary Lang, he, the said Seth Howell, at

the time of his so passing, uttering, publishing, and selling the said last-mentioned false, forged, and counterfeited treasury note as aforesaid, then and there, to wit, in the said city and county of San Francisco, in the district and State of California aforesaid, and within the jurisdiction of this court, well knowing said last-mentioned treasury note to be false, forged, and counterfeited.

Against the peace and dignity of the United States of America, in such cases made and provided.

(Signed) L. D. LATIMER,
*U. S. Attorney.*

5 Endorsed:

"Indictment for feloniously passing, uttering, publishing, and selling a certain false, &c., United States note, &c., &c.

"A true bill:

"WM G. BADGER, *Foreman.*"

"Presented in open court, and filed 22d March, 1870.

"GEO. E. WHITNEY, *Clk,*
"By L. S. B. SAWYER, *D. C.*"

"Witnesses: Mary Lang, Katie Lang, Annie Berger, C. Hecke, Officer Meagher."

6

7 *Demurrer to indictment.*

In the circuit court of the United States, ninth circuit, district of California.

THE UNITED STATES }
*v.* }
SETH HOWELL. }

And the said Seth Howell, in his own proper person, cometh into court here, and, having heard the said indictment read, saith:

First. That the first count in the said indictment, and the matters therein contained in manner and form as the same are above stated and set forth, are not sufficient in law, and that the said Seth Howell is not bound by the law of the land to answer the same.

Second. That the second count in the said indictment, and the matters therein contained in manner and form as the same are above stated and set forth, are repugnant and not sufficient in law, and that the said Seth Howell is not bound by the law of the land to answer the same.

Third. That the said indictment, and the matters therein contained in manner and form as the same are above stated and set forth,
8 are not sufficient in law, and that the said Seth Howell is not bound by the law of the land to answer the same.

And this he is ready to verify.

Wherefore, for want of a sufficient indictment in this behalf, the said Seth Howell prays judgment, and that by the court he may be dismissed and discharged from the said premises in the said indictment specified.

SETH HOWELL.

DAN'L T. SULLIVAN, *Counsel for Def't.*

—with intent then and there to defraud one Mary Lang, he, the said Seth Howell, at the time he so passed, uttered, published, and sold the said last-mentioned false, forged, and counterfeited United States note as aforesaid, then and there well knowing the same to be false,
3 forged, and counterfeited.

Against the peace and dignity of the United States of America, and against the form of the statute of the United States of America in such case made and provided.

And the grand jurors of the United States of America, within and for the district aforesaid, on their oath do further present: That Seth Howell heretofore, to wit, on the twenty-fifth day of October, in the year of our Lord one thousand eight hundred and sixty-nine, with force and arms, in the city and countyof San Francisco, and the State and district of California aforesaid, and within the jurisdiction of this court, feloniously did pass, utter, publish, and sell a certain false, forged, and counterfeited treasury note, issued under the authority of an act of Congress of the United States of America, entitled "An act to authorize the issue of United States notes, and for the redemption or funding thereof, and for funding the floating debt of the United States," approved February twenty-fifth, one thousand eight hundred and sixty-two, and which said false, forged, and counterfeited treasury note then and there was and now is as follows, that is to say:

"Washington No. 71138 23 New Series 10th 1862

March C 15

Vignette. 10 Vignette. E Pluribus Unum 10

4 The

United States

Promise to pay to the Bearer

Ten Dollars

Vignette.

Payable at the
Treasury of the U. S.
at New York
L. E. CHITTENDEN
*Register of the Treasury*

F. E. SPINNER,
*Treasurer of the United States*

And on which said note was then and there endorsed:

UNITED STATES

This note is a legal tender for all debts,
X public and private, except duties on imports and interest on the public debt, and is receivable in payment of all loans made to X
the United States

OF AMERICA."

—with intent to defraud one Mary Lang, he, the said Seth Howell, at

the time of his so passing, uttering, publishing, and selling the said last-mentioned false, forged, and counterfeited treasury note as aforesaid, then and there, to wit, in the said city and county of San Francisco, in the district and State of California aforesaid, and within the jurisdiction of this court, well knowing said last-mentioned treasury note to be false, forged, and counterfeited.

Against the peace and dignity of the United States of America, in such cases made and provided.

(Signed) L. D. LATIMER,
*U. S. Attorney.*

5 Endorsed:

"Indictment for feloniously passing, uttering, publishing, and selling a certain false, &c., United States note, &c., &c.

"A true bill:

"W'M G. BADGER, *Foreman.*"

"Presented in open court, and filed 22d March, 1870.

"GEO. E. WHITNEY, *Clk*,
"By L. S. B. SAWYER, *D. C.*"

"Witnesses: Mary Lang, Katie Lang, Annie Berger, C. Hecke, Officer Meagher."

6

7 *Demurrer to indictment.*

In the circuit court of the United States, ninth circuit, district of California.

THE UNITED STATES }
*v.* }
SETH HOWELL. }

And the said Seth Howell, in his own proper person, cometh into court here, and, having heard the said indictment read, saith:

First. That the first count in the said indictment, and the matters therein contained in manner and form as the same are above stated and set forth, are not sufficient in law, and that the said Seth Howell is not bound by the law of the land to answer the same.

Second. That the second count in the said indictment, and the matters therein contained in manner and form as the same are above stated and set forth, are repugnant and not sufficient in law, and that the said Seth Howell is not bound by the law of the land to answer the same.

Third. That the said indictment, and the matters therein contained in manner and form as the same are above stated and set forth,
8 are not sufficient in law, and that the said Seth Howell is not bound by the law of the land to answer the same.

And this he is ready to verify.

Wherefore, for want of a sufficient indictment in this behalf, the said Seth Howell prays judgment, and that by the court he may be dismissed and discharged from the said premises in the said indictment specified.

SETH HOWELL.

DAN'L T. SULLIVAN, *Counsel for Def't.*

(Endorsed:) Filed 24th March, 1870.

GEO. E. WHITNEY, *Clk*,
By L. S. B. SAWYER, *D. C.*

9 *Joinder in demurrer.*

In the circuit court of the United States, ninth circuit, district of California.

THE UNITED STATES }
*vs.*
SETH HOWELL. }

And L. D. Latimer, attorney of the United States for the district of California, who prosecutes for the said The United States in this behalf, saith:

First. That the first count in the said indictment, that the said indictment, and the matters therein contained, in manner and form as the same are therein stated and set forth, are sufficient in law to compel the said Seth Howell to answer the same.

Second. That the said second count in the said indictment, and the matters therein contained, are not repugnant, and are sufficient in law to compel the said Seth Howell to answer the same.

Third. That the indictment and the matters therein contained are sufficient in law to compel the said Seth Howell to answer the
10 same.

And the said The United States is ready to verify as the court here shall direct and award.

Wherefore, inasmuch as the said Seth Howell hath not answered to the said indictment, nor hitherto in any manner denied the same, the said The United States pray judgment, and that the said Seth Howell may be convicted of the premises in the said indictment specified.

L. D. LATIMER, *U. S. Attorney.*

(Endorsed:) Filed 24th March, 1870.

GEO. E. WHITNEY, *Clk*,
By L. S. B. SAWYER, *D. C.*

11 *Stipulation.*

In the circuit court of the United States, ninth circuit, district of California.

THE UNITED STATES }
*v.*
SETH HOWELL. }

It is stipulated by and between the respective parties to the above-entitled action, for the purposes of the demurrer only, that the charge in the indictment herein shall be confined to the uttering and passing of the note described in the indictment; and that the forged and counterfeited note alleged in the indictment to have been uttered and passed by the defendant, never was a genuine United States or treasury note issued under authority of the act of Congress, entitled "An act to authorize the issue of United States notes, and for the redemption or fund-

ing thereof, and for funding the floating debt of the United States," approved February 25, 1862.

(Signed) L. D. LATIMER,
*U. S. Attorney.*

(Signed) DAN'L T. SULLIVAN,
*Counsel for S. Howell.*

(Endorsed:) Filed 24th March, 1870.

GEO. E. WHITNEY, *Clk*,
By L. S. B. SAWYER, *D. C.*

12

13 *Certificate of opposition of opinion of judges of circuit court.*

UNITED STATES OF AMERICA:

Circuit court of the United States, ninth circuit, district of California.

At a stated term of the said court, begun and holden at the city and county of San Francisco, within and for the district of California, on the first Monday of February, in the year of our Lord one thousand eight hundred and seventy:

Present, Hon. Lorenzo Sawyer, circuit judge; Hon. Ogden Hoffman, district judge.

THE UNITED STATES
*v.*
SETH HOWELL.

This is an indictment against the defendant, containing two counts; the first of which said counts charges that, at the city of San Francisco, in the State of California, on the 25th day of October, A. D. 1869, the said defendant "feloniously did pass, alter, publish, and sell a certain false, forged, and counterfeited United States note, purporting to be a United States note issued under the authority of an act of Con-
14 gress of the United States, entitled 'An act to authorize the issue of United States notes, and for the redemption or funding thereof, and for funding the floating debt of the United States,' approved February 25th, 1862."

The second count charges that, at the city of San Francisco, in the State of California, on the 25th day of October, A. D. 1869, the said defendant "feloniously did pass, utter, publish, and sell a certain false, forged, and counterfeited treasury note, issued under the authority of an act of Congress of the United States of America, entitled 'An act to authorize the issue of United States notes, and for the redemption or funding thereof, and for funding the floating debt of the United States,' approved February 25th, A. D. 1862."

The defendant demurs to said indictment and the matters therein contained: To the first count as not sufficient in law to compel him to answer the same; to the second count as repugnant and not sufficient in law to compel him to answer the same; and to the whole indictment as not sufficient in law to compel him to answer the same.

The United States join in said demurrer; and it is stipulated in writing by and between the respective parties that the charge in the indictment shall be confined to the uttering and passing of the note

described in the indictment, and that the forged and counterfeited note alleged in the indictment to have been uttered and passed by the defendant never was a genuine United States or treasury note issued under authority of the said act of Congress.

The case coming on to be argued at this term, it occurs as questions—

First. Whether the second count in the said indictment, in manner and form as therein stated, is in itself repugnant.

Second. Whether the sixth section of the said act of Congress, entitled "An act to authorize the issue of United States notes, and for the redemption or funding thereof, and for funding the floating debt of the United States," approved February 25th, 1862, is repugnant; and whether any person could, under said act, be legally convicted of and punished for any offence whatever other than that of altering, and causing and procuring to be altered, and willingly aiding and assisting in altering, a note, bond, coupon, or other security issued under authority of said act.

Third. Whether the fourth paragraph or clause of said sixth section of the act aforesaid, which is in the words following, to wit: "Or
16 shall pass, utter, publish, or sell, or attempt to pass, utter, publish, or sell, or bring into the United States from any foreign place with intent to pass, utter, publish, or sell, or shall have or keep in possession or conceal, with intent to utter, publish, or sell, any such false, forged, counterfeited, or altered note, bond, coupon, or other security, with intent to defraud," &c., &c., is repugnant.

Fourth. Whether the defendant could, under said fourth paragraph or clause of said section, be legally convicted of and punished for uttering or passing a forged or counterfeit note purporting to be a United States or treasury note issued under authority of said act.

Fifth. Whether the defendant could, under said fourth paragraph or clause of said sixth section, be legally convicted of and punished for any offence whatever other than passing, uttering, publishing, or selling," &c., an "altered note, bond, coupon, or other security," &c.

On each of which said questions the opinions of the judges were opposed.

Whereupon, on motion of the United States, by their attorney, that the point on which the disagreement has happened may, during the term, be stated under the direction of the judges, and certified
17 under the seal of the court to the Supreme Court to be finally decided, it is ordered that the foregoing state of the pleadings, &c., be certified according to the request of the United States and the law in that case made and provided.

(Signed) LORENZO SAWYER,
*Circuit Judge.*

" OGDEN HOFFMAN,
*Dist. Judge.*

(Endorsed:) Entered on minutes and filed 26th March, 1870.
GEO. E. WHITNEY, *Clk*,
By L. S. B. SAWYER, *D. C.*

UNITED STATES CIRCUIT COURT,
*District of California, ss:*

Certified to the Supreme Court of the United States, pursuant to the statute.

Witness my hand and official seal.

[SEAL.] GEO. E. WHITNEY, *Clerk.*

18 UNITED STATES OF AMERICA,
*District of California, ss:*

I, George E. Whitney, clerk of the circuit court of the United States *court*, ninth circuit, district of California, hereby certify that the foregoing seventeen pages, numbered 1 to 17 inclusive, are a correct transcript of all the records and proceedings in the cause therein entitled.

Witness my hand and the seal of said circuit court, at San Francisco, in said district, this sixteenth day of April, A. D. 1870, and of our independence the ninety-fourth.

[SEAL.] GEO. E. WHITNEY, *Clerk.*

(Indorsement on cover:) No. 451. The United States, plaintiffs, vs. Seth Howell. California C. C. U. S.
Filed 3d May, 1870.

# In the Supreme Court of the United States.

DECEMBER TERM, 1870.

THE UNITED STATES, *Plaintiff*,
*vs.*
SETH HOWELL. } No. 219.

*On a certificate of division in opinion between the Judges of the Circuit Court of the United States for the District of California.*

BRIEF FOR THE UNITED STATES.

# In the Supreme Court of the United States.

DECEMBER TERM, 1870.

THE UNITED STATES, *Plaintiff*,
*vs.*
SETH HOWELL. } No. 219.

*On a certificate of division in opinion between the Judges of the Circuit Court of the United States for the District of California.*

## BRIEF FOR THE UNITED STATES.

The defendant in this case was indicted under the 6th section of the act of February 25, 1862, (12 Stat., 347,) which provides:

"That if any person or persons shall falsely make, forge, counterfeit, or alter, or cause or procure to be falsely made, forged, counterfeited, or altered, or shall willingly aid or assist in falsely making, forging, counterfeiting, or altering any note, bond, coupon, or other security issued under the authority of this act, or heretofore issued under acts to authorize the issue of Treasury notes or bonds; or shall pass, utter, publish, or sell, or attempt to pass, utter, publish, or sell, or bring into the United States from any foreign place, with intent to pass, utter, publish, or sell, or shall have or keep in possession or conceal, with intent to utter, publish, or sell, any such false, forged, counterfeited, or altered note, bond, coupon, or other secu-

rity, with intent to defraud any body corporate or politic, or any other person or persons whatsoever, every person so offending shall be deemed guilty of felony, and shall, on conviction thereof, be punished by fine not exceeding five thousand dollars, and by imprisonment and confinement to hard labor not exceeding fifteen years, according to the aggravation of the offence."

The indictment contains two counts.

The first count charges that the defendant "feloniously did pass, utter, publish, and sell a certain false, forged, and counterfeited United States note, *purporting* to be a United States note issued under the authority of" said act, with intent to defraud, &c., well knowing the same to be false, forged, and counterfeited.

The second count charges that the defendant "feloniously did pass, utter, publish, and sell a certain false, forged, and counterfeited Treasury note, issued under the authority of" said act, with intent to defraud, &c., well knowing the same to be false, forged, and counterfeited.

Demurrer to the indictment, and joinder. Afterwards, on argument, the following questions occurred:

"1. Whether the second count in the said indictment, in manner and form as therein stated, is in itself repugnant.

"2. Whether the 6th section of the act of Congress entitled 'An act to authorize the issue of United States notes, and for the redemption or funding thereof, and for funding the floating debt of the United States,' approved February 25, 1862, is repugnant; and whether any person could, under said act, be legally

convicted of and punished for any offence whatever other than that of altering, and causing and procuring to be altered, and willingly aiding and assisting in altering a note, bond, coupon, or other security issued under authority of said act.

"3. Whether the fourth paragraph or clause of said sixth section of the act aforesaid, which is in the words following, to wit: 'Or shall pass, utter, publish, or sell, or attempt to pass, utter, publish, or sell, or bring into the United States from any foreign place, with intent to pass, utter, publish, or sell, or shall have or keep in possession, or conceal, with intent to utter, publish, or sell, any such false, forged, counterfeited, or altered note, bond, coupon, or other security, with intent to defraud,' &c., is repugnant.

"4. Whether the defendant could, under said fourth paragraph or clause of said section, be legally convicted of and punished for uttering or passing a forged or counterfeit note purporting to be a United States or Treasury note issued under authority of said act.

"5. Whether the defendant could, under said fourth paragraph or clause of said sixth section, be legally convicted of and punished for any offence whatever, other than 'passing, uttering, publishing, or selling,' &c., an 'altered note, bond, coupon, or other security,'" &c.

On each of which questions the opinions of the judges were opposed. Whereupon, on motion, it was ordered that the points on which the disagreement happened be certified to this court.

The foregoing questions seem to resolve themselves into this: Whether the words, "*falsely make, forge, counterfeit* * * * * *any note, &c., issued under the authority of this act*," constitute a repugnancy in said section.

In support of the view that the description of the offence, in the words quoted, is repugnant in itself, it may be urged that, in order to be brought within the same, the charge must aver that the accused falsely made, forged, or counterfeited the identical note issued under the authority of the act—that is to say, that the note falsely made, forged, or counterfeited, was issued by authority of Congress, and is both false and genuine. But we submit that the language of the provision, properly construed, involves no such absurdity.

Forgery is defined to be "the false making an instrument, which purports on the face of it to be good and valid for the purposes for which it was created, with a design to defraud any person or persons." (Jones and Palmer's case, 1 Leach C. C., 366.) According to this definition, the phrase "if any person shall forge a note issued under authority of this act," may with propriety be read, "if any person shall falsely make a note which purports on its face to be a note issued under authority of this act." The term forge, as used in criminal law, means to fabricate that which upon its face assumes to be the instrument, writing, or thing named. Thus, to forge a will, is not to make a will, but a false writing which assumes to be a will. To forge a United States note, is not to make a genuine United States note, but a paper which assumes to be a United States note. So, to forge a "note issued under authority of this act," is not to make the identical note which was issued under authority of the act, but a note which falsely assumes

or purports to be a "note issued under authority of this act."

Starkie, in his Crim. Prac., p. 113, says: "A forged instrument cannot in strictness be called by the name of the real instrument which it assumes to be; an instrument purporting to be a bond, or writing obligatory, is not such, for no one is bound by it; and a forged writing, purporting to be a will, ought not in strictness to be called *a will*, for it is not so in any sense, and can have no legal operation whatever. But," he observes, "many statutes describing the offence of forgery use the words 'and if any person shall forge any *will*, or *bond*, (22 Geo. II, chap. 25,) or *writing obligatory*,' &c.; and therefore it may be averred in the indictment, that the defendant forged the will, (Rex. *vs.* Birch and Martin, Leach 92; East, P. C., 980,) bond, or writing obligatory." (Dunnett's case, East P. C., 985.)

This form of expression is sanctioned by long usage. It is employed in the following among other enactments:

Act of March 2, 1803, section 1, in reference to uttering or publishing "any false sea letter, Mediterranean passport, or certificate of registry." (2 Stat., 209.)

Act of March 3, 1813, section 13, as to falsely making, forging, or counterfeiting "any certificate or evidence of citizenship," &c. (2 Stat., 811.)

Act of March 3, 1823, section 1, in regard to falsely making, forging, or counterfeiting "any deed, power of attorney, order, certificate, receipt," &c. (3 Stat., 771.)

Act of February 5, 1859, section 1, respecting the forgery of "any military bounty-land warrant, or military bounty-land warrant certificate," &c (11 Stat., 381.)

Also, in 11 George IV, and 1 William IV, chapter 66, section 3, as to the forgery of "any exchequer bill," or "any note or bill of exchange of the Bank of England," or "any will, testament, codicil," &c.

And in an act of Massachusets, passed in 1804, the phraseology is similar to that used in the statute under consideration; it being there made an offence to falsely make, forge, or counterfeit "any note, certificate, or other bill of credit, *issued by* the treasurer of this Commonwealth," &c. This phraseology was retained in the Revised Statutes of that State of 1836, (p. 729,) and also in the General Statutes of 1860. (p. 808.)

No doubt can exist as to the meaning conveyed or intended to be conveyed by the expression, forge "any Mediterranean passport," or "any certificate of citizenship," or "any deed, power of attorney," &c., or "any military bounty-land warrant," or "any exchequer bill, will, testament," &c., or "any bill of credit issued by the treasurer of this Commonwealth," or "any note issued under the authority of this act," as used in the different statutes mentioned. It obviously signifies, to fabricate any paper writing which *purports* to be the passport, certificate, or other instrument described.

Accordingly, in the case of Rex *vs.* Birch and Martin, (see 1 Leach C. C. 79; 2 East P. C. 980; 2 Wm.

Black. Rep., 790,) where it was objected that the indictment should have charged the defendant with having forged and published "a certain will and testament," &c., and not "a paper writing purporting to be the last will," for the statute says, "shall forge a will," &c, upon the question being argued before all the judges, they unanimously agreed that the indictment was perfectly right, and overruled the exceptions, on a variety of precedents being produced, in which it was laid in the same manner, and they thought it would be good either way. (And see, as regards the latter opinion, State *vs.* Gardiner, 1 Iredell, 27.)

With reference to this subject, it is observed in 2 East P. C. *ubi supra*, "Though it be doubtless sufficient to charge that the defendant forged such an instrument, naming it, and setting forth the tenor, yet certainly the laying it to be a paper writing, &c., purporting to be such an instrument (as the statute on which the indictment is framed describes) is good; and, indeed, in strictness of language there may be more propriety in so laying it, considering that the purpose of the indictment is to disaffirm the reality of the instrument."

The conclusions at which we arrive are, that the phraseology employed in the section under consideration, viz: "forge any note issued under the authority of this act," is not, in its legal signification, repugnant, and will support an indictment; and that the averment in the indictment may be either that the defendant

"forged a certain note *purporting to be* a note issued under the authority of the act," or, more closely following the language of the statute, that he "forged a certain note issued under the authority of the act."

As to the case of the United States *vs.* Cantril, 4 Cranch, 167, which has probably given rise to the difference of opinion in the present case, it leaves us entirely in the dark whether the opinion of the court proceeded on the ground of repugnance in the indictment, or on the ground of repugnance in the act. It is to be observed that that case was decided by the court without argument; and no satisfactory reason is given for the conclusion reached by the court.

In this case the intention and purpose of Congress cannot be mistaken, and to set aside that obvious purpose upon a nice verbal criticism would be in violation of all rules of construction.

B. H. BRISTOW,
*Solicitor General.*

# In the Supreme Court of the United States.

DECEMBER TERM, 1870.

THE UNITED STATES, *Plaintiff*,
*vs.*
SETH HOWELL, *Defendant*. } No. 219.

BRIEF ON BEHALF OF DEFENDANT.

# In the Supreme Court of the United States.

DECEMBER TERM, 1870.

THE UNITED STATES, *Plaintiff*,
*vs.*
SETH HOWELL, *Defendant*. } No. 219.

BRIEF ON BEHALF OF DEFENDANT.

*First.* The indictment is repugnant and inconsistent in itself.

It charges that "the United States note" which the defendant is alleged to have "passed, uttered, published, and sold," was a false, forged, and counterfeited note; and yet that it was issued under the authority of an act of Congress of the United States, to wit, the act of February 25, 1862, (12 Stat. at Large, p. 347.)

How could the note be a "false, forged, and counterfeit" note if it was issued under the authority of an act of Congress? The object of issuing Treasury notes is that they may be "passed, uttered, published, and sold;" and how can the defendant, Howell, be guilty of a criminal act by doing that which it was the very object of the act should be done? The use of the adjectives "false, forged, and counterfeit" are inconsistent with

and repugnant to the allegation that the note was issued under proper authority; nor are qualifying words of themselves, even if there be no repugnancy or inconsistency in the indictment, sufficient to make a criminal offence. Vide in this connection:

Rex. *vs.* Jukes, 8 T. R., 542.

Commonwealth *vs.* Bean, 11 Cush., 414.

The words "purporting to be," in the first count of the indictment, do not help, nor do they mean anything more than the count would mean without them. "Purporting to be" simply means the substance of the note as it appears on the face of it to every eye that reads it.

2 Russel on Crimes, 381, (star paging.) 7th Am. Ed., by G. Sharswood.

Besides, these words are not in the statute on which the indictment is founded. At common law, the pleader, in drawing an indictment, might use these words or omit them; and we conceive, without varying the sense; but in counting upon a statute, the language of the written law must be strictly pursued.

2 Hawk., P. C., chap. 25, sec. 111.

Commonwealth *vs.* Ashley, 2 Gray, 357.

U. S. *vs.* Gooding, 12 Wheat., 460.

Thacker *vs.* Ld. Sanders, 3 Bing., 580.

Rex *vs.* Int. of Hodnett, 1 T. R., 96.

The offence must be within both the *letter* as well as the spirit of the law.

Smith Com. on Stat. and Cons. Law, p. 839, &c.

*Second.* The statute under which the indictment is

framed, or at least so much thereof as relates to the charge of "passing, uttering, publishing, and selling" the note in question, is repugnant and void.

U. S. *vs.* Cantrill, 4 Cranch, 167, and case there cited.

See also U. S. *vs.* Sheldon, 2 Wheat, 119.

The Schooner "Enterprise," 1 Paine, 32, &c.

The indictment in Cantrill's case was framed upon a statute in all material respects like the statute of February 25, 1862, under which Howell is indicted. Defendant, Cantrill, was indicted under act of Congress of June 27, 1798, (1 Stat. at Large, p. 573,) for "uttering, passing," &c., a ten dollar note, "purporting to be" a note "issued by order of the president," &c., of the bank. The words "purporting to be" were not in the statute, nor were there any words such as are usually found in statutes of this character; as, for instance, "in the similitude of," "in imitation of," or others pointing against the disposing and putting off of notes *which have not been issued by competent authority.* The counsel for Cantrill made the objection which is taken here, that the statute was fatally defective in not containing these or similar words, and the whole court, through Marshall, C. J., adjudged the objection to the statute to be well taken, and for that reason ordered that the judgment be arrested. Owing to this decision, an amendatory act was immediately passed by Congress, February 24, 1807, (2 Stat. at Large, p 423,) to remedy and cure the defect of the preceding act, by inserting certain words, such

as "in imitation of," &c., which were not in the said preceding act. If the court will take the trouble to look into the various acts of Congress which have been passed for the purpose of punishing offences of this character, it will find that, with the exception of the present act of 1862, and that of 1798, none of them have failed to use the words, "in imitation of," "in the similitude of," or words of similar import. Here, then, we have the sense of the legislature as to the necessity in the statutes of these or similar words, and also two decisions directly in point of the highest court in the land. It is no argument to say that in Massachusetts or some other States can be found statutes upon the subject which omit these words. Nor is the construction of this statute of 1862 to be determined by citing a statute of a State which may be similar to this. We have yet to learn that the meaning and construction of one statute are to be gathered by finding another identical in phraseology with the one whose meaning and construction are sought. We, of course, are aware of the object of the law-making part of the Government in all these statutes, but agreeably to the well-known principles of construction applicable to criminal statutes; as, for instance, that they are to be construed strictly; are not to be extended by implication; that the offence must be within the letter as well as intention of the statute. Can this court say that their object has been "plainly, fully, substantially, and formally" expressed—"*voluit*," it may be conceded, "*sed non dixit.*" And, again, we say, if it be

true, that following the decision of the Supreme Court in Cantrill's case as the law in cases of this kind, the legislature have in all subsequent statutes made use of the words deemed necessary by the Supreme Court in that case, then we have a right to consider that without these or similar words are found in this statute no indictment is good under it. The legislature, acquiescing in the opinion of the Supreme Court, have themselves frequently since passed upon this question, and have, so to speak, authorized a form of a statute to punish this offence, being guided in their proceedings by the decision in U. S. *vs.* Cantrill; and however, therefore, it may be in other courts or States, we take it to be clear that this Court will not at this late day depart from this long-established *form*. Innovations in matters of form where they relate to questions of property are bad enough as a rule, and are certainly dangerous in respect to the forms of criminal code. The Supreme Court having given a construction to a statute in all respects like the one under consideration, in a case, too, upon all-fours with the present, has not this defendant a right to say that he is not guilty of any offence; to demur to an indictment which charges him with violating the provisions of a statute which the highest tribunal has pronounced void? It is assumed, for the purpose of the general good, perhaps, that every one is cognizant of the law, and that no one can plead ignorance of a criminal law as a valid excuse for violating it. This is hard enough upon criminals charged with a violation of a common-law offence;

how much more severe when applied against a party charged with the commission of an offence which can exist only by virtue of some statute, as is the case in respect to all offences against the United States, which has no common-law criminal code. This being so, there is great force, as we conceive, in saying, as the defendant now says to the court, "I have committed no offence against the laws of the United States; I am guilty of no offence under the act of 1862, as this indictment alleges, because you yourselves have decided that the legislature have not made it any offence to do what I am charged with having done, and have determined that, though the legislature may have intended to punish me for doing what I am charged with, they have failed to manifest their intention, as the law relating to criminal statutes requires should be done."

Suppose the court should hold that the decision in Cantrill's case was wrong? Then we say that, up to the moment when the court should have made such decision, it was, so far as the citizen had the means of knowing, being guided by the doctrine in United States *vs.* Cantrill, no offence to pass a United States note under this statute; that such was the law laid down in Cantrill's case, and was law until that case was reversed, which, in criminal cases as *against* the criminal, is almost an unheard of occurrence; and that to hold differently at this day is as it were to punish Howell because of a difference of opinion between he present court and the court as it was constituted at

the time when Cantrill's case was decided, in 1807. It would be almost like an *ex post facto* law for the court to virtually reverse the decision of their distinguished predecessors. They held in favor of the liberty of the citizen, and required of the legislature that before they deprive him of his liberty for a long period of years, for what, morally considered, is no worse than cheating or tricking a person out of ten dollars in any other way, but which the purposes of modern society render necessary to punish with great severity.

We need not urge upon this court the importance of adhering in all cases to the previous adjudications which it has made, and more especially in criminal cases, where the liberty of the subject, always favored by common law, is in question. "Better," to use the language of Lord Mansfield, "that the law should be *settled*, even though settled *wrong*, than that it be uncertain and *unsettled*." In conclusion, we say, if the court shall incline to our opinion that the statute in question is in all material respects like the statute of 1798, pronounced void in Cantrill's case, it must follow logically, that when defendant, Howell, uttered the note mentioned in the indictment, it was the same thing as if no statute upon the subject existed, or rather as if the statute of February 25, 1862, under which he stands indicted, had not been passed.

DAN'L T. SULLIVAN,
*Counsel for S. Howell.*